HSBC Bank Malaysia Bhd v Menteri Sumber Manusia, Malaysia & Anor (No 2)

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1–25–209 OF 2009
MOHD ZAWAWI SALLEH J
15 JUNE 2012

Administrative Law — Judicial review — Certiorari — Application to quash decision of Minister for Human Resources — Whether Minister wrong in deciding certain categories of resident managers employed by bank could be represented by union — Whether Minister applied wrong test and considered irrelevant matters — Failure of Minister and parties who helped formulate decision to explain how decision arrived at — Whether Minister's decision perverse and against weight of evidence

The second respondent ('the union'), whose constitution did not permit it to represent resident managers whose work involved managerial, confidential and security functions, filed a claim for recognition on the applicant ('HSBC') seeking to represent all resident managers employed by HSBC. The claim was filed under s 9 of the Industrial Relations Act 1967 ('the Act'). HSBC responded by writing to the Director-General of Industrial Relations ('DGIR') requesting him to ascertain the union's competency to represent all of its resident managers in view of the fact that there were resident managers who were engaged in managerial, confidential and security capacities. Arising from that request, the Industrial Relations Department ('IRD'), acting on the DGIR's behalf, conducted random interviews with 142 resident managers employed by HSBC to determine the union's scope of membership. The DGIR subsequently informed HSBC that the first respondent ('the Minister') had decided under s 9(5) of the Act that, inter alia, those employees of HSBC under the categories of manager band 4, manager band 5 and manager band 6 were not employed in managerial, confidential or security capacities. The Minister's decision meant HSBC's resident managers in bands 4, 5 and 6 could be represented by the union. HSBC filed a judicial review application for certiorari to quash the Minister's decision in that regard, inter alia, on the ground he had failed to appreciate the fact there were employees under bands, 4, 5 and 6 who did carry out managerial, confidential or security functions. The Minister, it was argued, had come to his decision based on an employee's job-grade and that that was a wrong test to apply. The union, on the other hand, argued that since the Minister's decision was based on the findings forwarded to him from the investigations done by the Director-General of Trades Union ('DGTU') on the union's competency and the interviews conducted by the DGIR, through the IRD, on the scope of membership of the

union, judicial deference should be given to the findings and recommendations of the DGIR, DGTU and the decision by the Minister.

Held, allowing the application with no order as to costs:

(1) The Minister erred in law in failing to appreciate that under the job grades of manager band 4, manager band 5 and manager band 6, there were about 347 positions and titles held by employees of HSBC whose job functions and responsibilities showed they carried out either managerial and/or confidential and/or security functions in substance and in effect. Those employees did not fall within the scope of representation of the union (see paras 48 & 38).

(2) The Minister failed to explain how he had arrived at the conclusion that Managers in bands 4, 5 and 6 were not employed in managerial, confidential or security capacities. Neither did he satisfactorily address matters raised in HSBC's affidavit providing detailed explanation on why managers in those bands were actually engaged in those capacities (see paras 59 & 64).

(3) In basing his decision on the job grade of the employees in the form of bands, the Minister had erred in law because he had asked himself the wrong questions and applied the wrong test. The correct test was to examine the job titles and job description of each category of employees. Job grade did not reflect the job titles, job description or scope of work done by the employees and could not be the yardstick to determine whether they were employed in managerial, confidential or security capacities. Nowhere did the Minister aver that either he or the DGTU/DGIR officers had considered, examined or taken into account the job description of the affected employees (see paras 60 & 63).

(4) The reports of the investigations carried out by the DGIR and DGTU were not disclosed and neither did those parties explain their investigation processes or results. Although there was no duty under the Act for the Minister to disclose the reports made by the DGTU, the duty was, inter alia, implied since it was necessary to ensure fairness and prevent an aberrant, unreasonable or irrational decision and assist the courts to know whether the decision-maker had taken into account relevant considerations or acted properly (see paras 65 & 67).

(5) The Minister had considered irrelevant matters and arrived at a decision that was so perverse and unreasonable that no reasonable tribunal in similar circumstances would have arrived at such a decision or conclusion (see para 60(d)–(e)).

(6) In determining whether the facts, in truth, existed, the court would not defer to the fact-finding of the administrative decision-maker. A

reviewing court must determine independently for itself whether the jurisdictional fact existed (see paras 53 & 55).

[Bahasa Malaysia summary

Responden kedua ('kesatuan sekerja tersebut'), yang mana perlembagaan tidak membenarkannya untuk mewakili pengarah-pengarah bermastautin di mana pekerjaan yang melibatkan fungsi-fungsi pengurusan, sulit dan sekuriti, telah memfailkan tuntutan untuk pengiktirafan terhadap pemohon ('HSBC') memohon untuk mewakili kesemua pengarah bermastautin yang dilantik HSBC. Tuntutan telah difailkan di bawah s 9 Akta Perhubungan Perusahaan 1967 ('Akta tersebut'). HSBC telah membalas dengan menulis kepada Ketua Pengarah Perhubungan Perusahaan ('KPPP') meminta beliau untuk mengesahkan kebolehan kesatuan sekerja untuk mewakili kesemua pengarah bermastautinnya memandangkan terdapat pengarah-pengarah bermastautin yang terlibat dalam kapasiti pengurusan, sulit dan sekuriti. Berbangkit daripada permintaan tersebut, Bahagian Perhubungan Perusahaan ('BPP'), bertindak bagi pihak KPPP telah melakukan temuramah rawang dengan 142 pengarah residen yang dilantik oleh HSBC untuk menentukan skop keahlian kesatuan sekerja tersebut. KPPP selanjutnya memaklumkan HSBC bahawa responden pertama ('Menteri tersebut') menurut s 9(5) Akta telah membuat keputusan bahawa, antara lain, pekerja-pekerja HSBC yang tergolong di bawah kategori pengarah band 4, pengarah band 5 dan pengarah band 6 tidak dilantik dalam kapasiti pengurusan, sulit dan sekuriti. Adalah dihujah bahawa, Menteri telah membuat keputusannya berdasarkan gred pekerjaan pekerja dan bahawa ujian tersebut adalah ujian yang salah untuk digunakan. Kesatuan sekerja, sebaliknya, berhujah bahawa memandangkan keputusan Menteri adalah berdasarkan dapatan yang diberikan kepadanya daripada siasatan yang dilakukan oleh Ketua Pengarah Kesatuan Sekerja ('KPKS') tentang kebolehan kesatuan sekerja dan siasatan yang telah dilakukan oleh KPPP, melalui BPP, berdasarkan skop keahlian kesatuan sekerja, deferens kehakiman seharusnya diberikan terhadap dapatan dan saranan KPPP, KPKS dan keputusan oleh Menteri.

Diputuskan, membenarkan permohonan dengan perintah tanpa kos:

(1) Menteri telah khilaf dalam undang-undang dalam kegagalan untuk mengamati bahawa di bawah gred pekerjaan pengarah band 4, pengarah band 5 dan pengarah band 6, terdapat 347 jawatan dan pangkat yang dipegang oleh pekerja-pekerja HSBC yang mana fungsi dan tanggungjawab pekerjaan menunjukkan mereka telah menjalankan sama ada fungsi pengurusan dan/atau sulit dan/atau sekuriti dalam isi hal dan efek. Pekerja-pekerja tersebut tidak terangkum dalam skop representasi kesatuan (lihat perenggan 48 & 38).

(2) Menteri telah gagal untuk menjelaskan bagaimana beliau mendapat kesimpulan bahawa pengarah-pengarah dalam band 4, 5 dan 6 tidak

dilantik dalam kapasiti pengurusan, sulit dan sekuriti. Beliau juga tidak dengan sepenuhnya menangani perkara-perkara yang dibangkitkan di dalam afidavit yang memberikan penjelasan terperinci tentang mengapa pengarah-pengarah dalam band tersebut telah dilantik dalam kapasiti tersebut (lihat perenggan 59 & 64).

(3) Dengan membuat keputusannya berdasarkan gred pekerjaan pekerja-pekerja dalam bentuk band, Menteri telah terkhilaf dalam undang-undang kerana beliau telah mempersoalkan soalan yang salah dan menggunakan ujian yang salah. Ujian yang betul adalah untuk meneliti pangkat dan deskripsi pekerjaan setiap kategori pekerja-pekerja. Gred pekerjaan tidak menggambarkan pangkat, deskripsi atau skop pekerjaan yang dilakukan oleh pekerja-pekerja dan tidak seharusnya menjadi kayu ukur untuk menentukan sama ada mereka dilantik dalam kapasiti pengurusan, sulit dan sekuriti. Menteri juga tidak menegaskan bahawa beliau atau pegawai KPKS/KPPP telah mempertimbangkan, meneliti atau mengambil kira deskripsi pekerjaan pekerja yang terlibat (lihat perenggan 60 & 63).

(4) Laporan siasatan yang dijalankan oleh KPPP atau DGTU tidak dikemukakan dan pihak-pihak juga tidak menjelaskan proses atau keputusan siasatan. Meskipun tidak terdapat kewajipan di bawah Akta untuk Menteri mengemukakan laporan-laporan yang dilakukan oleh KPKS, kewajipan tersebut adalah, antara lain, tersirat memandangkan ia adalah perlu untuk memastikan keadilan dan menghindarkan keputusan luar biasa, tidak berpatutan dan tidak munasabah dan membantu mahkamah-mahkamah untuk mengetahui sama ada pemberi keputusan telah mengambil kira pertimbangan yang relevan atau telah bertindak dengan wajar (lihat perenggan 65 & 67).

(5) Menteri telah mempertimbangkan perkara-perkara yang tidak relevan dan telah membuat keputusan yang sangat bertentangan dan tidak berpatutan yang mana tiada tribunal yang berpatutan dalam keadaan yang sama akan membuat keputusan atau kesimpulan yang serupa (lihat perenggan 60(d)–(e)).

(6) Dalam menentukan sama ada fakta-fakta sebenarnya wujud, mahkamah tidak akan menerima dapatan pemberi keputusan badan tadbir. Mahkamah yang membuat semakan hendaklah menentukan secara bebas dengan tersendiri sama ada fakta bidang kuasa wujud (lihat perenggan 53 & 55).]

Notes

For cases on certiorari, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 280–290.

Cases referred to

Attorney General Malaysia v Chemical Workers' Union of Malaya & Anor [1971] 1 MLJ 38 (refd)

Buck v Bavone (1976) 135 CLR 110, FC (refd)

Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal [2001] 4 MLJ 97; [2001] 3 CLJ 9, CA (refd)

Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135, HC (refd)

Doody v Secretary of State for the Home Department [1993] 3 All ER 92, HL (refd)

E v Secretary of State for the Home Department [2004] QB 1044, CA (refd)

Kaneka Paste Polymers Sdn Bhd v Director General of Industrial Relations & Ors [2005] 7 MLJ 132, HC (refd)

Marulee (M) Sdn Bhd v Menteri Sumber Manusia & Anor [2007] 6 MLJ 222, CA (refd)

Minister of Labour Malaysia v Lie Seng Fatt [1990] 2 MLJ 9, SC (refd)

Montes v Secretary of State for the Home Department [2004] EWCA Civ 404, CA (refd)

National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower [1980] 2 MLJ 189, FC (refd)

National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd, Rengan [2000] 2 MLJ 144; [2001] 1 CLJ 681, CA (refd)

Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600; [2001] 1 CLJ 9, CA (refd)

R (MH) v Bedfordshire County Council [2007] EWHC 2435 (Admin) [2008] ELR 191, HL (refd)

R (on the application of Assura Pharmacy Ltd) v NHS Litigation Authority [2008] EWHC 289 (Admin), HL (refd)

R (on the application of Shaheen) v Secretary of State for the Home Department [2008] All ER 20, QBD (refd)

R v Prolife Alliance v British Broadcasting Corporation [2003] 2 All ER 977, HL (refd)

R v Secretary of State for Scotland [1999] SLR 74; [1999] 1 All ER 481; [1999] 2 WLR 28, CA (refd)

R v Secretary of State for the Department, ex parte Duggan [1994] 3 All ER 277, CA (refd)

Ranjit Kaur Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

Reg v City of London Corporation, ex parte Matson [1997] 1 WLR 765, CA (refd)

Reg v Secretary of State for the Home Department, ex p McAvoy [1998] 1 WLR 790, CA (refd)

Runa Begum v Tower Hamlets London Borough Council [2003] UKHL 5, HL (refd)

Taylor's College Sdn Bhd v Ketua Pengarah Kesatuan Sekerja Malaysia & Ors [2009] 3 MLJ 437, CA (distd)

William Jack & Co (M) Sdn Bhd v S Balasingam [2007] 7 MLJ 1; [1997] 3 CLJ 235 (refd)

Legislation referred to

Industrial Relations Act 1967 s 9, 9(1)(a), (c), (d), (1A), (2), (4A), (4C), (5)
Rules of the High Court 1980 O 53
Trade Unions Act 1959 ss 2, 26(1A)

Sivabalah (Raymond Low with him) (Shearn Delamore & Co) for the appellant.
Wan Suhaila bt Mohd (Senior Federal Counsel, Attorney General's Chambers) for the first respondent.
Ramesh Chandran (Revindran Pillai with him) (Renuka Rabindranath & Associates) for the second respondent.

Mohd Zawawi Salleh J:

APPLICATION

[1] Impugned in this application for review on certiorari, filed by HSBC Bank Malaysia Bhd ('the applicant'), is the part of the decision of the Minister of Human Resource, Malaysia ('the Minister') dated 4 May 2009, made under s 9 of the Industrial Relations Act 1967 ('the Act'). The Minister determined, inter alia, that 'manager band 4, manager band 5 and manager band 6 are employers that are not employed in the managerial, confidential or security capacity'.

[2] The applicant sought to quash the part of the said decision.

[3] I have given anxious scrutiny to the submissions of counsel and to the documents and authorities relied upon by the parties. For the reasons that follow, I am of the view that this application is impressed with merit and should be allowed.

FACTS OF THE CASE

[4] The facts of the case, as submitted by the parties, may be stated as follows:

(a) by a letter of 13 February 2006, the Union had submitted a claim for recognition under s 9 of the Industrial Relations Act 1967 ('the Act'). In the notice of recognition in Form A dated 13 February 2006, the Union

filed a claim of recognition on the applicant seeking to represent all the resident manager employed by the applicant, as follows:

> (ii) The following class or classes of workmen employed by you:
>
> In the same form, the Union deleted the paragraph which is reflected in the following manner:
>
> All workmen employed by you, except those in managerial, executive confidential or security capacity.

(b) The applicant responded by issuing a letter dated 23 February 2006 to the director general of industrial relations ('the DGIR') requesting the following issues to be ascertained by the DGIR under s 9(3(c) of the Act:

(a) whether or not the Union is a competent union to represent all resident managers; and

(b) whether or not the intended scope of representation of the Union with reference to Form A and r 3 of the Union's Constitution satisfies the requirements of s 9(1) of the Industrial Relations Act 1967.

(c) Arising from the applicant's letter dated 23 February 2006, the Industrial Relations Department in Putrajaya ('IRD Putrajaya') had issued a letter dated 18 August 2006 to the Industrial Relations Department in Kuala Lumpur ('IRD KL') to inform that the applicant had raised an issue on the scope of membership of Union under s 9(1A) of the Act. The letter took cognisance of the applicant's argument that there were resident managers who were engaged under the managerial, confidential and security capacity and hence, the assistance of the IRD KL was sought to conduct interview with the relevant Resident Managers to ascertain the matter further. The said letter was signed by one Encik Zun Bin Rawi of the IRD Putrajaya;

(d) the IRD KL, acting on behalf of the DGIR, then issued a letter dated 11 May 2007 to the applicant to request the applicant to provide the Industrial Relations Department with a list of the names of officers and titles in issue to enable the office to arrange for an interview session oh a date to be fixed. This was in connection with the scope of representation of the Union. The said letter was signed by one Hj Abdul Razak;

(e) the IRD KL, acting on behalf of the DGIR, further issued a letter dated 3 July 2007 to the applicant enclosing a list of the names of executives employed by the applicant. The list contained 142 names that were selected at random for the interview session. The applicant was requested to revert on the suitable time and place for the interview sessions;

(f) the interview sessions were held between 8 August 2007 and 13 December 2007;

(g) it was alleged by the applicant that although the IRD KL had conducted the interview sessions with the selected employees, the said department did not obtain the views and input from the applicant neither did the said department invite the applicant to provide any information or feedback in relation to the matter; and

(h) on 21 May 2009, the applicant received a copy of the letter from the DGIR advising that the Minister had handed down a decision under s 9(5) of the Act in respect of the scope of representation of the Union. The Minister's decision, which is embodied in Form E dated 4 May 2009, stated the following:

> Maka pada menjalankan kuasa-kuasa di bawah Seksyen 9(5), Akta Perhubungan Perusahaan 1967, saya adalah dengan ini memutuskan bahawa:
>
> (i) Pengurus band 1, Pengurus band 2 dan Pengurus band 3 adalah pekerja-pekerja yang diambil kerja dalam kapasiti pengurusan, sulit atau keselamatan.
>
> (ii) Pengurus band 4, Pengurus band 5 dan Pengurus band 6 adalah pekerja-pekerja yang bukan diambil kerja dalam kapasiti pengurusan, sulit atau keselamatan.

[5] The decision of the Minister is composed of the following matters:

(a) that employee employed as manager band 1, manager band 2 and manager band 3 are employed in the managerial, confidential or security capacity; and

(b) that employees employed as manager band 4, manager band 5 and manager band 6 are not employed in the managerial, confidential or security capacity.

[6] At a result of the decision, only employees who are employed as manager band 4, manager 5 and manager band 6 can be represented by the union as they are not employed in the managerial, confidential or security capacity.

PRELIMINARY ISSUE

[7] At the commencement of this application, learned counsel for the second respondent has taken a preliminary objection on the ground that the applicant's application is premature because the applicant should wait for the Minister to hand down his decision on the recognition issue under s 9(5) of the Act. The second respondent also argued that the applicant should not challenged the administrative process on the matter.

[8] In support of his submission, learned counsel for the second respondent relied upon the following cases:

(a) *Taylor's College Sdn Bhd v Ketua Pengarah Kesatuan Sekerja Malaysia & Ors* [2009] 3 MLJ 437; and

A (b) *Kaneka Paste Polymers Sdn Bhd v Director General of Industrial Relations & Ors* [2005] 7 MLJ 132.

[9] I respectfully disagree with the submissions of learned counsel for the second respondent.

B

[10] Upon bare and cursory reading of s 9 of the Act, it is clear that there are two different and district types of the dispute that the Minister has to decide:

(a) dispute on recognition claim filed by a trade union under s 9(2) of the C Act; and

(b) dispute on whether any workmen are employed in a managerial, executive, confidential or security capacity under s 9(1A) of the Act.

D **[11]** Section 9(2) of the Act states as follows:

> A trade union of workmen may serve on an employer or on a trade union of employers in writing in the prescribed form *a claim for recognition* in respect of the workmen or any class of workmen employed by such employer or by the members of such trade union of employers. (Emphasis added.)

E

[12] On the other hand, s 9(1A) states as follow:

> Any dispute arising at any time, whether before or after recognition has been accorded, *as to whether any workman or workmen are employed in a managerial,* F *executive, confidential or security capacity* may be referred to the Director General by a trade union of workmen or by an employer or by a trade union of employers. (Emphasis added.)

[13] From the provision of s 9(1A), it is clear that the dispute on whether 'any G workmen are employed in a managerial, executive, confidential or security capacity' can arise 'whether before or after recognition has been accorded'. This shows that a dispute under s 9(1A) can arise independent of a recognition dispute under s 9(2) of the Act.

H **[14]** In addition, s 9(4A) of the Act clearly recognizes these two distinct types of disputes, as follows:

> The Director General, upon receipt of a reference under *subsection (1A), or an application under paragraph (3)(c),* or a report under subsection (4) may take such I steps or make such enquires as he may consider necessary or expedient to resolve the matter. (Emphasis added.)

[15] In s 9(1A) dispute, if the DGTU is unable to resolve the matter, he has to refer the matter to the Minister under s 9(4C) of the Act.

[16] Next, the Minister would then have to hand down his decision under s 9(5) of the Act, which provides as follows: A

> Upon receipt of a notification under subsection (4C) the Minister shall give his decision thereon; where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer or trade union of employers concerned, as the case may be, as from such date as the Minister may specify; *a decision of the Minister under this subsection may include a decision as to who are workmen employed in a managerial, executive, confidential or security capacity.* (Emphasis added.) B C

[17] In my judgment, the present application is not premature. The Minister had made his decision relating to the s 9(1A) dispute under s 9(5) of the Act. This is a final decision which is capable of being challenged under O 53 of the Rules of the High Court 1980. In fact, a failure to challenge the Minister's decision in the present case would prejudice the applicant because it cannot wait for the recognition decision by the Minister under s 9(5) of the Act and challenge both decisions at the same time. This is because there is a time limit of 40 days under O 53 of the Rules of the High Court challenge the present decision. D E

[18] With respect, the second respondent's reliance of the cases of *Taylor's College Sdn Bhd v Ketua Pengarah Kesatuan Sekerja Malaysia* and *Kaneka Paste Polymers Sdn Bhd v Director General of Industrial Relations & Ors* are misplaced. F

[19] In *Taylor's College*, the dispute was a recognition claim made by the Union on the college. The DGTU had decided to conduct the membership check by way of verification exercise instead of secret ballot. There, the employer, without waiting for the Minister's final decision under s 9(5) had filed an application for judicial review to challenge the decision of the DGTU on membership check for his failure to carry out a secret ballot. The Court of Appeal held that the application was premature because the employer should have waited for the final decision of the Minister under s 9(5). G

[20] Similarly, in *Kaneka Paste Polymers*, the employer had challenged the decision of the DGIR on competency (similarity in trade, business) in a recognition claim without waiting for the Minister's final decision. The High Court ruled the application was premature. H

[21] The facts in the instant case do not fit into the factual matrix and profile of the facts in *Taylor's College* and *Kaneka Paste*. In the present case, the dispute is under s 9(1A) of the Act rather than a recognition dispute. Secondly, unlike the case of *Taylor's College* and *Kaneka*, the applicant had already waited for the Minister to hand down his decision under s 9(5) of the Act. In the instant case, I

the applicant is actually challenging the decision of the Minister directly. The DGIR and DGTU are not parties to the present proceedings.

GROUNDS OF CHALLENGES

[22] The Minister's decision is challenged on three separate grounds.

[23] The first ground of review is that the Minister failed to consider that under band 4, 5 and 6, there are employees who are carry out managerial, confidential or security functions.

[24] The second ground of review is that the Minister erred in law in premising the decision based on job-grade. The Minister asked the wrong questions or applied wrong test.

[25] The third ground of review is that there was a breach of natural justice.

[26] The foregoing grounds of challenge, in my opinion, boil down to the lone issue of the whether the Minister had taken into consideration the relevant facts when he made the said decision.

PRINCIPLE APPLICABLE TO JUDICIAL REVIEW

[27] A proposition that should be unnecessary to state is that judicial review, does not strictly speaking, permit a court to consider the merit of the case. To a large extent, the court is more interested in the process of decision making rather than the actual result.

[28] Authority for this abounds in Malaysia and abroad (see *Minister of Labour Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9; *National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower* [1980] 2 MLJ 189; *William Jack & Co (M) Sdn Bhd v S Balasingam* [2007] 7 MLJ 1; [1997] 3 CLJ 235; *National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd, Rengan* [2000] 2 MLJ 144; [2001] 1 CLJ 681; *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; [2001] 1 CLJ 9; *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal* [2001] 4 MLJ 97; [2001] 3 CLJ 9).

[29] The scope of judicial review and its relationship with evidential merits of any particular decision was summarised in *R v Secretary of State for Scotland* [1999] SLR 74; [1999] 1 All ER 481; [1999] 2 WLR 28 in the following terms:

> Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose

> decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from ordinary appeal, the court may not set about forming its own preferred view of the evidence.

[30] It is settled law that the circumstances in which a reviewing court may examine the factual foundation of the opinion of the decision-maker are limited. The limited review permitted by the court was summarised by Raus Shariff FCJ (as he then was) in the context of the award by the Industrial Court which is also applicable to this instant case in *Ranjit Kaur Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629. His Lordship held that where the facts do not support the conclusion arrived at by the Industrial Court, or where findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider the relevant matters into consideration, such findings are amenable to judicial review.

[31] Review of error of fact is now a well-established ground of English judicial review. Although English judges had traditionally been cautious about challenges based on errors of fact, the test now applied is that set down by Carnwarth LJ in the case of *E v Secretary of State for the Home Department* [2004] QB 1044. Carnwarth LJ relied upon the principle of fairness to assert a separate ground of review for mistake of fact, and expressed the view that:

> the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve for correct result.

[32] Carnwarth LJ then established a number of requirements for a finding of unfairness based on mistake of fact:

(a) first, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter;

(b) secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable;

(c) thirdly, the appellant (or his advisers) must not been have been responsible for the mistake; and

(d) fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.

[33] The principles in the *E* case have been approved and are applied with increasing frequency by the English courts (see *Montes v Secretary of State for the Home Department* [2004] EWCA Civ 404; *R (on the application of Assura Pharmacy Ltd) v NHS Litigation Authority* [2008] EWHC 289 (Admin), para 118; *R (MH) v Bedfordshire County Council* [2007] EWHC 2435 (Admin) [2008] ELR 191, para 51; *R (on the application of Shaheen) v Secretary of State for the Home Department* [2008] All ER 20).

[34] In *Runa Begum v Tower Hamlets London Borough Council* [2003] UKHL 5, Lord Bingham had held that a review decision may be quashed:

> not only … if it is held to be vitiated by legal misdirection or procedural impropriety or unfairness or bias or irrationality or bad faith, but also if there is no evidence to support factual findings made or they are plainly untenable or … if the decision-maker is shown to have misunderstood or been ignorant of an established and relevant fact.

[35] In the same vein, Gibbs J in *Buck v Bavone* (1976) 135 CLR 110 had this to say at pp 118–119:

> Whether the decision of the authority under such a stature can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts.

[36] To summarise, the general rule, no doubt, is that findings of facts of an administrative body, which has acquired expertise in the particular field of endeavor, are accorded great weight by the reviewing court. The rule is not absolute and admits of certain well-recognised exceptions, however. Thus, when the findings of facts of the Industrial Court or the Minister of Human

Resources, as in the instant case, are not supported by substantial evidence or their decision was based on a misapprension of facts, the reviewing court may made independent evaluation of the facts of the case. The reviewing court, may look into the record of the case and re-examine the findings if it considers the same to be necessary to arrive at a just decision.

FINDINGS OF THE COURT

Ground (a)

[37] Based on available evidence, (see exh LWK21 of the applicant's first affidavit in support dated 25 June 2009), it is clear that the Minister had erred in law in failing to appreciate the relevant facts and consideration on the following reasons:

(a) that under the job grade manager band 4, 5 and 6, there are employees employed in positions and job titles that carry out *managerial* functions. The full list of positions and job titles that carry out managerial functions have been summarised in para 40(a) of the applicant's affidavit in support dated 25 June 2009 (Eefer — Appendix 1 of the submissions).
These employees carry out managerial functions due to the following reasons:

(i) the employees are all managers having managerial duties and responsibilities and a team of direct reports (comprising executives and/or assistant managers); and

(ii) the employees all have responsibilities to plan, lead/manage, direct and delegate their roles and responsibilities to their direct reports/team, apart from managing and controlling resources, budgets and expenses to be within approved limits in their respective departments.

(b) that under the job grade manager band 4, 5 and 6, there are employees employed in position and job titles that carry out *confidential* functions, such as:

(i) manager employee relations;

(ii) senior resourcing and development manager;

(iii) senior employees relations and communications manager;

(iv) senior compensation and benefits manager;

(v) manager, human resources relationship;

(vi) manager, human resources operations and systems;

(vii) manager, compensation policy;

(viii) human resources benefits and payroll manager;

(ix) assistant manager hr support and systems;

(x) assistant manager hr operations and manpower planning;

(xi) assistant manager, graduate recruitment;

(xii) assistant manager, employee relations;

(xiii) assistant manager, hr data analysis; and

(xiv) legal advisors.

The employees employed in the above positions are all attached to Human Resource Department and are primarily dealing with confidential staff matters or staff relations which include interviewing and selection/employment of executive and managers, handling payroll matters (all levels of employees) and/or managing industrial/employee relations. It is crucial to note that s 9(1)(a), (c) and (d) of the Act provides that no trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities may seek recognition in respect of workmen employed in any of the said capacities, that it to say:

(i) managerial capacity;

(ii) confidential capacity; and

(iii) security capacity.

(c) that under the job grade manager band 4, there is an employee employed in a position and job title that carries out security functions, ie the position of manager security and financial crimes. The employee concerned is responsible in managing and overseeing all aspects of security and financial crimes, which include investigations into internal and external fraud and also managing all aspects of physical security within the head office and all other buildings and branches of the bank.

[38] There is a material error of law when the Minister failed to appreciate that in view that there are employees that are employed under job grade manager band 4, manager band 5 and manager band 6 that carry out managerial, confidential or security functions, *these employees of the applicant do not fall within the scope of representation of the union for the purpose of the instant recognition claim.*

[39] It is pertinent to note that the constitution of the second respondent ('RMA') does not permit the union to represent employee who are engaged in the managerial, confidential and security capacities.

[40] In this respect, r 3(1) of the RMA's Constitution stipulates the following: A

> (1) Membership of the union shall be open to all Resident Managers who are employed by the HSBC Bank Malaysia Berhad *except those who are employed in managerial capacity, confidential capacity or security capacity …* (Emphasis added.) B

[41] In short, the scope of membership of RMA is confined to all resident managers save for those falling under the managerial, security and confidential capacities. This means that it cannot represent employees who are employed in the managerial, security or confidential capacity. C

[42] It is an established principle of trade union law that a trade union of employees is bound by its rules of membership and is only permitted to represent employees who are within the scope of their representation. D

[43] Section 2 of the Trade Unions Act defines a trade union as:

> any association or combination of workmen within any particular trade, occupation or industry or within any similar trades, occupations or industries. E

[44] It is instructive to note that s 26(1A) of the Trade Unions Act also provides that: F

> No person shall join, or be a member of, or be accepted or retained as a member by, any trade union if he is not employed or engaged in any establishment, trade, occupation or industry in respect of which the trade union is registered. G

[45] In *Attorney General Malaysia v Chemical Workers' Union of Malaya & Anor* [1971] 1 MLJ 38, an issue was brought before the High Court as to whether the registrar of Trade Unions was correct in ruling that a company's industries were similar to those enumerated in the rules of the union. In the course of dealing with the said issued, the High Court held that: H

> It is the duty of the Registrar of Trade Unions to register a trade union of workers employed in similar trade, occupation or industry, to approve the federation of two or more trade unions, or the affiliation of a trade union with the federation of trade unions, of similar trade, occupation or industry. For these and these purposes only could the registrar validly exercise his powers to declare similarity of trade, occupation or industry. I

And later at para F of the same page, the court proceeded to hold as follows:

> … *it seems to me that once a trade union is registered it is bound by the rules of its constitution. It can only represent that category or class of workmen as is specified its rules.* If a trade union desires to extend its membership clause to include workmen engaged in other categories of work or industry, it should first amend its rules. In this instant case the Chemical Workers' Union of Malaya has failed to do so. (Emphasis added.)

[46] This was re-emphasised by the Court of Appeal in *Marulee (M) Sdn Bhd v Menteri Sumber Manusia & Anor* [2007] 6 MLJ 222, as follows:

> A trade union of employees is bound by their constitution in respect of the scope of representation. A union can only represent the category or class of workmen specified in their constitution. It must be an association of workmen in similar trades, occupations or industries (see *Minister of Labour & Manpower v Paterson Candy (M) Sdn Bhd* [1980] 2 MLJ 122). (Emphasis added.)

[47] However, in the instant case, the Minister had decided that employees employed as manager band 4, manager band 5 and manager band 6 are not employed in the managerial, confidential or security capacity. The effect is that such employees falling under bands 4, 5 and 6 can be represented by the Union.

[48] In my view, in so ruling, the Minister had failed to appreciate that under job grades of manager band 4, manager band 5 and manager band 6, there exists approximately 347 positions and titles held by employees of the applicant as at 13 February 2006 whose job functions and responsibilities of the positions reflect that such employees carry out either managerial and/or confidential and/or security functions, in substance and in effect.

[49] Learned counsel for the second respondent argued that the Minister had stated that his decision was based on the findings forwarded to him from the investigation by the DGTU on the competency of the Union and the interviews conducted by the DGIR on the scope of membership of the Union. The Minister had taken into account the result of the investigation by the DGIR pertaining to the capacity of the employees under band 4, 5 and 6 and he satisfied that the nature of work of these employees are outside the managerial, confidential and capacity. It should be appreciated that the decision was based on the answer provided by the employees interviewed.

[50] Furthermore, the government officers from the IRD KL office are independent; they are well versed in the disputed subject matter; they are knowledgeable and intelligent enough to know what is the objective of the interview and what question to be posed to the interviewee.

[51] Based on exhs LWK10, 11, 12 and 16, it is apparent that the DGIR had taken the right and necessary steps to determine the issue. The findings from the interview session and finding from the DGTU office was put forward to the Minister for his determination and decision.

[52] It was submitted by learned counsel for the second respondent that having regard to the context of the purpose or object underlying the Act, the findings and recommendations by FGIR and DGTU and the decision by the Minister should be given a judicial deference.

[53] With respect, I disagree. In determining whether the facts in truth exist, the court will not defer to the fact finding of the administrative decision-maker. In England, Lord Hoffman in *R v Prolife Alliance v British Broadcasting Corporation* [2003] 2 All ER 977 rejected the doctrine of deference. His Lordship said at pp 997 [75]–[76]:

> [75] My Lords, although the word 'deference' is now very popular in describing the relationship between the judicial and the other branch of government, I do not think its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.
>
> [76] This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle. It is reflected in art 6 of the convention. On the other hand, the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise, when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law.

[54] Spigelman CJ, speaking extracurially, has added:

where intervention by a court is designed to ensure the institutional integrity of the decision-making process, it should be clear that 'deference' is entirely inappropriate. That does not mean that a court will not give considerable weight to the conclusions on fact and usage, including jurisdictional facts, of primary decision-makers. This will, however, depend on the statutory scheme under consideration. To do more would be to abdicate the judicial function. To do less would be to blur the legality/merits distinction which, whatever the difficulties of its application, remains a rigorously policed boundary in Australian administrative law.

(See J Spigelman, 'Jurisdiction and Integrity', The Second Lecture the 2004 National Lecture Series for the Australian Institute of Administrative Law, Adelaide, 5 August 2004, p 11).

[55] Courts in Australia have similarly rejected any idea of judicial deference. In *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, the High Court rejected the suggestion that courts should defer to administrative fact finding. A reviewing court must 'determine independently for itself' whether the jurisdictional fact existed.

[56] Hence, the High Court held in that case that it was for the primary judge of the reviewing court to determine the jurisdictional fact as to whether the decision-maker had jurisdictional on the evidence before the judge, and the intermediate appealable court had erred in holding that the judge should defer 'in grey areas of uncertainty to the practical judgment' of the administrative decision-maker.

[57] I turn now to the factual scenario of this case. It should be noted that based on the Industrial Relations Department letter dated 18 August 2006 to IRD KL (exh LWK5), the IRD KL was specifically instructed to obtain a written statement from amongst the employees resident managers to the following particulars:

(a) 'nama kakitangan';

(b) 'gred serta gaji sekarang'; and

(c) 'tugas serta tanggungjawab mereka di antara lain kenal pasti kuasa 'discretionary' yang ada mengenai hal-hal tatatertib, laporan atau syor atas kenaikan pangkat access' kepada perkara sulit dan sebagainya;

[58] The said letter also clarified that the above areas are not exhaustive and that the IRD KL could ask additional information to ascertain on whether the said employees fall within the managerial, confidential or security capacities.

[59] All these particulars were not even provided in the Minister's affidavit in reply to explain on how he had decided that the managers band 4, 5 and 6 do not fall within the said categories. To exacerbate the matter, the Minister had

also failed to satisfactorily address the applicant's averment and issues raised in paras 39–41 of the applicant's affidavit in support dated 25 June 2009, which in essence, provide detailed explanation on why such managers in bands 4, 5 and 6 are actually engaged in managerial, confidential or security capacities.

SECOND GROUND

[60] In premising his decision by reference to the job grade of the employees in the form of bands, the Minister had erred in law because it had asked himself the wrong questions and/or applied the word test when in actual fact, the correct test and approach was to examine the job titles of each category of employees. In short, the Minister had erred in law when:

(a) he had asked himself the wrong question to ascertain the issues;

(b) he had applied the wrong test to determine whether the employees were within the scope of representation of the Union;

(c) he had failed to consider relevant matters, such as that:

(i) job grade does not reflect the job titles, job description or scope of work done by the employees;

(ii) that job grade cannot be used as an indicia, reference point and/or yardstick to determine whether the employees were employed in the managerial, confidential or security capacity;

(iii) the correct approach was to assess the employees by reference to their job titles and job description;

(d) he had considered irrelevant matters; and

(e) arrived at a decision that is so perverse and unreasonable that no reasonable tribunal in similar circumstances would have arrived at such a decision or conclusion.

[61] Learned counsel for the second respondent submitted that the nature of work of an employee is very subjective. In most instances, it would be overlapping and it would be difficult to ascertain whether or not that employee falls within or outside the scope of membership of the Union. As the Union is registered to represent the resident managers of the applicant all the members are inevitably 'managers' per se. Supervising, guiding, delegating, managing are all terms which could be related to any level of organization and does not by itself determines one to be a managers. To hire and fire, to transfer, suspend and to promote are some of the responsibilities attributed to a manager. Similarly, it would alsd not be easy to differentiate which employee are employed and recognised to be doing work which are held to be confidential or work which can be classified as security based.

[62] Further, in light of the abovesaid difficulties, the interview conducted by the DGIR whereby the employee is directly interviewed would, to a great extent, remove the ambiguity. The list of titles as provided by the applicant in Appendix 1 of his submission is only true in form but not in substance. The exact nature of the work can only be established by interviewing them personally and not otherwise.

[63] With respect, I disagree. The court is of the considered opinion, had the Minister properly examined the job titles and the job description of each position, he would have come to the conclusion that there are employees of the applicant who are employed either in the managerial, confidential or security capacities. If one examines carefully the Minister's affidavit in reply in detail, no where did the Minister aver that either he or the officers of the DGTU/DGIR had actually considered, examined or even taken into account the job description of the affected employees. In fact, a cursory review of the list in exh LWK21 will show that many of the positions and posts are confidential and security position, irrespective of rank.

[64] To exacerbate the seriousness of the matter, the Minister had failed to disclose in his affidavit an explanation as to how he had arrived at the conclusion that manager band 4, band 5 and band 6 are not employed in managerial, confidential or security capacity. All that the Minister had explained on this issue can be found at paras 21–22:

> 2.1 Merujuk perenggan 34 dan 35 Afidavit Pemohon, perkara tersebut adalah dalam makluman Responden Pertama dan keputusan tersebut adalah dibuat berdasarkan fakta-fakta yang diterima daripada siasatan dan temuduga yang dibuat oleh KPPP dan JHEKS.
>
> 2.2 Saya menafikan perenggan 36 hingga 41 Afidavit Pemohon dan saya sesungguhnya menyatakan bahawa saya telah mengambilkira hasil siasatan KPPP yang dimaklumkan kepada saya berkaitan kapasiti pekerja-pekerja yang berada di band 4, band 5 dan band 6, saya telah berpuas hati bahawa mereka bukan terlibat di dalam kapasiti pengurusan, sulit atau keselamatan.

[65] The Minister had explained that he had relied on the investigations that were carried out by the Director General of Industrial Relations and Director General of Trade Unions. However, the reports of such investigations have not been disclosed neither has the DGIR or DGTU averred any affidavit to explain on their investigation processes or results. This begs the burning question — how did the DGTU, DGIR and Minister arrive at the decision that manager band 4, 5 and 6 are not employed in managerial, confidential or security capacity?

[66] Learned senior federal counsel appearing for the Minister submitted that there is no requirement under any written law to compel the Minister to disclose the reports made by DGTU in pursuance to their duty under the Act.

[67] In my judgment, although there is no duty under the Act for the Minister to disclose the reports made by DGTU, the duty is, inter alia, implied since it is necessary to ensure fairness and to prevent an aberrant, unreasonable or irrational decision. The disclosure of the reports will assist the courts in performing their supervisory functions to know whether the decision-maker took into account relevant consideration or acted properly.

[68] In the leading House of Lords case of *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92, Lord Mustill referred to the term 'fairness' as 'an insistence on greater openness, or … 'transpancy' in the making of administrative decisions'. The law Lord further stated that:

> Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

[69] The concept of fairness as outlined in Doody was applied in *R v Secretary of State for the Department, ex parte Duggan* [1994] 3 All ER 277, *Reg v City of London Corporation, ex parte Matson* [1997] 1 WLR 765 and *Reg v Secretary of State for the Home Department, ex p McAvoy* [1998] 1 WLR 790.

THIRD GROUND

[70] The applicant did not desire to proceed with the third ground of the application. Therefore, is not necessary for the court to discuss the issue.

CONCLUSION

[71] For all these reasons, the application for a judicial review is allowed with no order as to costs. The part of the Minister's decision dated 4 May 2009 is set aside.

Appliction allowed with no order as to costs.

Reported by Ashok Kumar